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IN THE

Supreme Court of the United States

October Term, 1965

No. 215

LEON ADJMI and JOSEPH ADJMI,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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LEON ADJMI and JOSEPH ADJMI, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled matter on March 31, 1965.

OPINION BELOW.

The opinion of the court below (Appendix A, *infra*, pp. 21-23) is reported at 343 F. 2d 164.

JURISDICTION.

The judgment of the court below (Appendix A, *infra*, p. 24) was entered on March 31, 1965. A timely petition for rehearing was denied on May 13, 1965 (Appendix B, *infra*, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether it was proper to transform a prosecution for mail fraud and conspiracy in connection with insurance claims submitted through the mails in respect of a single fire, as alleged in the indictment on trial, into a prosecution for mail fraud and conspiracy in connection with insurance claims submitted through the mails in respect of four fires, three of which were not alleged in the indictment on trial but had been alleged in three other and separate indictments, consolidation of which with the indictment on trial had earlier been denied.

2. Whether, when a trial judge charges that "The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted," and when after objection by both prosecution and defense counsel the trial judge then charges further, "I withdraw that, because the rule is the defendants, if they testify at all, they don't have to rebut anything," the burden of going forward to disprove the allegations of the indictment is improperly cast upon defendants who do not testify.

STATUTES INVOLVED.

Petitioners were convicted of conspiracy in violation of 18 U. S. C. § 371 and of mail fraud in violation of 18 U. S. C. § 1341. Since nothing turns on the terms of either provision, they are not set out here.

STATEMENT.

These petitioners are the sole survivors of four individual defendants and one corporate defendant named in the indictment, all of whom were convicted following a trial. The corporate defendant did not appeal; the judgment as to the defendant Charles Adjmi was reversed by the court below; and the defendant Erwin Cohen died following affirmance but before the filing of a petition for rehearing.

A. The Present Indictment.

The indictment here in question (No. 63-115-T-Cr) contained three counts.

Count One (R. 3-4) alleged that, in violation of 18 U. S. C. § 1341, the four individuals and the corporation, J. & C. A. Corporation, devised a scheme to defraud certain insurance companies by falsely overvaluing the property located at 132 East Flagler Street, Miami, Florida, operated by Cohen; by falsely overstating the amount of loss suffered in a fire on those premises on September 25, 1958; and by depositing the resultant claim for loss in the mails on November 28, 1958.

Count Two (R. 4-5) repeated the same allegations in respect of another mailing on December 2, 1958.

Count Three (R. 5-6) charged only the four individuals for conspiracy contrary to 18 U. S. C. § 371, alleging that they conspired together to devise a scheme to obtain money and property by means of the false pretenses set forth in the substantive counts, and to violate 18 U. S. C. § 1341 by so doing.

B. Summary of Prosecution Evidence Directly Relating to the Claims Submitted in Respect of the Fire at 132 East Flagler Street Alleged in the Indictment.

There was evidence from which the jury could find that Cohen purchased the business at 132 East Flagler Street, conducted under the name of Flagler Imports, from petitioner Leon Adjmi, hereafter "Leon" (R. 511-512, 664-665, 688), with money lent by the petitioner Joseph Adjmi, hereafter "Joseph" (R. 512-513), and that all the Adjmis assigned their lease to him (R. 518-519).

After Cohen's original insurance was cancelled (R. 334-355), new insurance was written for him at Joseph's suggestion to an agent, and that coverage was increased after Joseph told the agent that Cohen needed more because Joseph had lent him merchandise (R. 365-374, 390-397). New merchandise, consisting of linens and Dresden china, was moved into Cohen's shop (R. 615-616), and he had $210,000 of insurance in force when the fire took place two days later, on September 25, 1958 (R. 376-377, 384-385).

The fire was confined to the mezzanine, producing some but not heavy smoke, and no soot or fallout (R. 128-254). Firemen said that only a few linens were burned (R. 159-160, 222), but that none of the porcelain figurines were broken (R. 132-133, 160-162, 224, 246-249, 259, 264, 283, 294, 298, 310-314).

Later, several of the figurines were seen to be broken (R. 133, 155, 203, 206, 298-299, 313, 358), and a heavy charcoal deposit was observed (R. 204-205, 312, 358-359), which as a matter of laboratory analysis differed from smoke fallout (R. 400-404, 409, 418-430, 434, 440-450). Following the fire, the figurines and linens that Cohen had received from Joseph were returned to the latter (R. 529-532, 594, 749).

Cohen submitted and mailed two proofs of loss, aggregating $208,000 (Govt. Ex. 24, 27; R. 453-460, 475-482, 523, 531). In consequence of conferences with numerous

insurance adjusters, Cohen's claim was scaled down to $96,000 (R. 384-388, 468-470), but it was ultimately denied *in toto* (R. 470, 472, 488-503).

C. Colloquy Over Admissibility of Evidence Concerning Other Fires to Show Intent of the Adjmis; Other Indictments of the Adjmis Involving Those Other Fires.

Following the introduction of the prosecution evidence that has just been summarized, the United States Attorney in a colloquy outside the presence of the jury undertook to offer, as bearing on the intent of the Adjmis under the asserted doctrine of *Weiss v. United States,* 122 F. 2d 675 (C. A. 5), certiorari denied, 314 U. S. 687, evidence showing their complicity in three other fires in respect of which they had allegedly also submitted false claims (R. 762-766).

These involved, first, a fire on March 21, 1958, on the premises of the J. & C. A. Corporation d/b/a Dresden Galleries; second, a fire on September 29, 1958, on the premises of Dauber, Inc.; and, third, a fire on October 8, 1958, on the premises of the French Shop, Inc., owned by one Sam Mishon (R. 763-766).

Petitioners' counsel advanced the following objection, based on prior proceedings:

First, there had earlier been returned another indictment (No. 11971; Ct. Ex. 1) which had included counts and allegation in respect of all four fires, that at Flagler Imports as to which proof had already been adduced, as well as concerning the three others that the prosecution now proposed to offer on the issue of intent; and this earlier indictment had been dismissed because the inclusion of four fires in a single indictment had been deemed prejudicial (R. 766-773).

Second, there had subsequently been returned four indictments, each dealing with the alleged frauds arising

out of each of the four fires—the one presently on trial, No. 63-115, in respect of the Flagler Imports fire, and three others, Nos. 63-116, 63-117, and Orlando Division No. 1276, concerning the three other fires that the prosecution had sought to introduce into the present case (R. 767-771, 808-812).

Finally, third, the prosecution's motions to consolidate for trial the four separate indictments each restricted to a single fire had been denied prior to the present trial because of potential prejudice to the defendants (R. 26, 767-771, 778-785, 790-792, 807-808; Ct. Ex. 2).

In the light of these prior proceedings, petitioners objected at length to the admission of any testimony whatever involving the other fires (R. 766-773, 795-797, 799-801).

Arguing in reply, the United States Attorney limited his argument on admissibility to intent, state of mind, limited purpose, and "limiting instruction" (R. 774-778, 785-787, 798-802).

At the close of the long colloquy just set forth, petitioners moved for a severance (R. 802-803).

The trial court ruled that, under the Weiss doctrine, evidence of intent was admissible (R. 805-806), and denied the motion for severance (R. 806). Repeating that the proffered evidence was admissible on the issue of intent (R. 809), the trial judge quoted a former judicial colleague as saying (R. 810) "that if the defendant didn't want the evidence of other crimes to go to the jury, he should commit only one crime at a time."

At the close of the colloquy, the court gave all defendants a standing objection to all testimony relative to all fires other than the one that occurred at 132 East Flagler Street, the one alleged in the present indictment (R. 815-817).

D. Evidence Regarding Other Fires in Which the Adjmis Were Involved.

Following the ruling just mentioned, the prosecution introduced evidence concerning three other fires in which the Adjmis but not the appellant Cohen were involved.

(i) First was a fire on the premises owned by the J. & C. A. Corporation, which was there doing business under the name of Dresden Galleries, on January 23, 1958; a passerby had flipped a cigarette into an awning, this caught fire, and in the course of extinguishing the fire the awning collapsed, breaking the plate glass window and causing damage, for which proofs of loss were submitted (R. 953-961; Govt. Ex. 77-79). In respect of this fire, the prosecution contended, on the basis of testimony from the supplier of the damaged merchandise (R. 975 *et seq.*) that the claim was too high by $2,000 (R. 1335-1336).

(ii) Next was an accidental (R. 923) fire on the same premises on March 21, 1958. There was evidence from which the jury could find that, at Joseph's request, new insurance supplanting other policies was written in January 1958 (R 820-831); that thereafter an inventory was made and a claim submitted (R. 839-882, 923-924). In the course of the adjustment process, there were questions concerning the inventory (R. 916-921).

Celnick, a New York importer of china and porcelain who sold such articles to the Adjmis, testified that his sales prices were in many instances substantially less than the prices placed on the supporting invoices that the corporation had submitted (R. 966-1023). Karpus, another New York importer, testified to the same effect, and also said that, at Leon's request, he had supplied a false invoice that was requested in connection with a fire claim (R. 1034-1065).

(iii) The third fire took place in a back room at French Shop, Inc., in Miami, owned by one Sam Mishon, on October 8, 1958, when an electric flatiron was left plugged in (R.1111-1115). There was testimony from which the jury could find that this was a store that sold ladies apparel and sportswear (R. 1108, 1123-1125, 1150); that at Joseph's request on September 30, 1958, additional insurance was effected for Sam Mishon because he was getting additional merchandise; that the increased insurance came to $145,000; and that Joseph said he would stand back of the $500 premium check that Mishon was reluctant to write because of lack of funds (R. 1148-1156). Joseph said he sold $125,000 worth of linens to Mishon, but produced no supporting documents (R. 1079-1083, 1099-1105). The sale was not reflected on the books of J. & C. A. Corporation, and Joseph and the corporation's accountant later admitted to a revenue agent that this was a fictitious contract so far as the Adjmis were concerned and was a fake for some insurance purposes (R. 1084-1087, 1089-1092).

Linens and embroidery listed by the insured were, according to appraisers of both, overvalued (R. 1162-1265).

Evidence was received from postal officials as to the mailing of certain proofs of loss submitted in connection with fires other than the one on 132 East Flagler Street alleged in the indictment (R. 1136-1138, 1139-1144).

In the course of the foregoing testimony regarding the other fires, counsel for the petitioners, notwithstanding the standing objection they had been given, regularly moved to strike the evidence of every witness that was unrelated to the Flagler Imports—132 East Flagler Street fire alleged in the present indictment, and objected on that basis to all similarly unrelated exhibits (R. 826-827, 833-834, 835, 857-859, 866, 873-874, 875-876, 882, 885-886, 890, 892, 895-896, 899-900, 901-902, 912, 914, 921, 928-929, 940-941, 945, 950, 951, 952-953, 957-959, 973-974, 1014, 1048, 1069-1070, 1072-

1073, 1076, 1077, 1083-1084, 1088, 1092-1093, 1097-1098, 1105, 1110, 1115, 1122, 1125-1126, 1131, 1133-1134, 1135-1136, 1138-1139, 1144-1145, 1158-1159, 1174-1177, 1228-1229, 1232, 1251-1252, 1254, 1255, 1265).

E. The United States Attorney Transforms the Prosecution Into One for a Master Plan for One Continuous Scheme of Conspiracy Involving Four Fires.

Inasmuch as none of the witnesses called in connection with the three other fires knew or had any dealings with Cohen, or knew anything about his business or his premises at 132 East Flagler Street (R. 828, 830, 868, 952, 959-960, 1061, 1099), Cohen moved that the testimony regarding the other fires, which were quite unrelated to him, be stricken (R. 1268-1270).

Arguing in opposition to the Cohen motion, the United States Attorney completely transformed the prosecution from the single conspiracy involving the East Flagler Street fire alleged in Count 3 of the indictment (R. 5-7). He said (R. 1270):

> "We have before the Court now a rather simple master plan, so to speak, which, from the evidence adduced was one continued scheme of conspiracy with various and sundry people coming and going into it, like Mishon coming into the picture and Cohen coming into the picture after the inception of this scheme."

The United States Attorney then proceeded to recite the series of four fires, first that in January 1958 at Dresden Galleries, then the larger one there in March, next the Flagler Imports fire, and finally the one in the French Shop (R. 1270-1272), after which he said (R. 1272, 1273):

> "So we can clearly see that we don't have just multiple claims, multiple frauds, multiple conspiracies.

The testimony and the facts before the Court and the jury right now is, and the reason it is all admissible against all the parties is that this is all one scheme. * * *

"* * * we have one plan, starting in January, going to March, to September and October losses. * * * We have more than the Weiss case of just similar transaction to prove intent. We have one scheme, consisting of four fires. * * *"

Again recapitulating (R. 1273), the prosecutor concluded (R. 1273-1274):

"So we have four fires as a part of one scheme.

"And that is why the evidence is admissible as it stands right now against all of the parties. * * * On the question, not only of conspiracy, but on the question of a scheme to defraud. The indictment charges that the scheme * * * had its inception prior to September of 1958 and continued to the return of the indictment. So it is broad enough to encompass all of the fires as one master plan."

Further (R. 1274-1275),

"The way the evidence has come in, it is just one conspiracy. It is not separate transactions relating to intent. It is one scheme and one conspiracy with parties coming and going, Cohen coming and going, Mishon coming and going * * * it is all too clear that this is one picture with various and sundry people who have come and gone."

And once more (R. 1275):

"* * * a motion to strike the testimony as to Cohen * * * is not a proper motion under the facts and the law of the case because we have one scheme and the jury should consider whether or not the scheme existed and who were the participants. * * *"

After a further colloquy, the United States Attorney said (R. 1283):

> "We have shown one transaction, one scheme. I submit it is proper to go before the jury on either theory, either they find that the similar transactions occurred, and I submit that as it now is before the Court and jury it is one scheme—if they were to find they were just similar and not one scheme, they could consider it as to the intent of the parties. But they could find that one scheme or one conspiracy existed, and, accordingly consider that in rendering their opinion."

Before the trial judge ruled, counsel for these petitioners then moved to strike the evidence of the other fires (R. 1285-1288), arguing *inter alia* that the prosecution should be bound by its four separate indictments.

Motions for acquittal were denied (R. 1297-1298), after which all defendants rested (R. 1299-1300), and the several motions to strike were overruled (R. 1308, 1311).

In his argument to the jury, the United States Attorney made the following references to the single scheme he had put forward in his arguments in opposition to Cohen's motion to strike:

> "* * * we felt at the outset that we had what you might call a master plan, an over-all scheme, and accordingly from that which is heretofore gone on—meaning we have a fire sometime in September in the indictment, but we have proved to you a fire in January, a fire in March, a fire in October, and we ask you * * * to consider all of those in determining whether or not a scheme and/or conspiracy existed." (R. 1334)

> "We are going back to January of 1958. That was the start of this scheme, the start of this conspiracy." (R. 1335)

After relating the January fire, "This is the start of this whole scheme" (R. 1336). "So we have the inception of this scheme, the inception of the conspiracy in January" (R. 1337).

After dealing with the March fire, "So here we have another step, another step leading up to fire, that we charge is the fire which is the subject matter of this indictment" (R. 1341).

Further (R. 1344),

> "I am sure counsel for the defendants are going to say that isn't what they are charged with. They are charged with the Cohen fire. But isn't this clearly, unquestionably a fraud in the January fire, in the March fire, when you have the same type of fraud committed by the exact same parties?
>
> "Now let's get to the Cohen fire, the subject matter of the indictment. * * *"

F. Charge; Verdict and Sentences; Appeal.

(i) With reference to the evidence of the other fires, the trial judge charged as follows:

> "* * * there are two questions only for your determination at this time. One is the sole question as to whether there was a fraud or a scheme or an artifice and whether the mails were used * * *." (R. 1423)
>
> "I permitted testimony about other fires and other things for the purpose of enabling the jury to determine whether or not there was an intention on the part of the defendants to form a scheme to defraud." (R. 1424)
>
> "So if you find there was a scheme, then everybody who was a part of that scheme, whatever one did, every [even?] though the others were in distant place, yet each one would be responsible for what the one who did some act does." (R. 1425)

"So that the question I see for your debate and your consideration is the question as to whether there was an intention to form a scheme, and, incidentally whether it was formed and who were the members of the scheme." (R. 1425)

"The question for you is whether or not a scheme was devised and intended to be devised. And for that purpose all of this testimony about other fires was admitted so that you might be able to determine whether or not there was an intention on their part to devise a scheme, and whether or not a scheme was devised, and who the members of this scheme were. So all this testimony must be considered by you in reaching a conclusion as to who were participants in the scheme." (R. 1430-1431)

Objection was made on behalf of petitioners that the evidence of the other fires was not limited to intent (R. 1450-1451, 1455-1458).

The judge then charged further regarding the law of conspiracy, speaking always of "a conspiracy" and "the conspiracy" (R. 1462-1466). The defendants renewed their objections (R. 1469-1470).

(ii) With respect to the indictment, the trial judge originally charged as follows (R. 1423):

"As I said, the indictment was returned by a Grand Jury, but the Grand Jury heard evidence on only one side of the case. The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted. So it is upon that theory that the Grand Jury returned an indictment."

Once the trial judge had concluded his charge, the United States attorney immediately objected to the foregoing passage as incorrect (R. 1441-1442). The defendants

moved for a mistrial on the ground that this erroneous impression could not be eradicated (R. 1453-1454); that motion was denied (R. 1458).

Thereafter, the trial judge charged as follows (R. 1461):

> "* * * I said something about what the Grand Jury did in this case. I think it is proper for me to withdraw that statement. I said the Grand Jury, while they heard only one set of circumstances, from what they heard they decided that if that evidence was not refuted, the defendants ought to be convicted. I withdraw that, because the rule is the defendants, if they testify at all, they don't have to rebut anything. It is for the jury to determine from all the evidence whether they are guilty or innocent."

After the trial judge concluded his lengthy supplemental charge, the defendants renewed their original objections, and renewed as well their motion for mistrial, which was again denied (R. 1469-1470).

All of the defendants named in the indictment were found guilty as charged (R. 1472-1473).

Each of the Adjmis was sentenced to a total of 10 years' confinement (5 years on each count, two counts to run consecutively, two counts concurrently) and a fine of $1,000 (R. 1496-1498).

On appeal, the judgment was reversed as to Charles Adjmi because of insufficiency of evidence, but affirmed as to the other individuals. The court concluded that "the charge when construed as a whole did not imply that there was any obligation upon the defendants to take the witness stand, did not misplace the burden of proof, and presents no prejudicial error," and further rejected without discussion all contentions made in respect of the broadening at the trial of the conspiracy charged in the indictment.

REASONS FOR GRANTING THE WRIT.

It would be difficult as an original proposition, petitioners submit, even to imagine an instance of cumulative prejudice such as is reflected in this record, both aspects of which involve the palpable disregard both by the district court and the court of appeals of principles long since considered settled by decisions of this Court. On one side, these petitioners have been tried for and convicted of a conspiracy far wider in scope than that alleged against them in the indictment, an error compounded by the circumstance that the prosecution's earlier attempts to bring before a single jury their participation in precisely that wider conspiracy had twice been halted by the district court. On the other side, this improperly enlarged accusation was heard by a jury that had been all too plainly told that petitioners were under no obligation to rebut what the grand jury alleged if they testified—*but not otherwise,* and they did not take the stand.

First. The heart of this case is that petitioners, charged for participation in a conspiracy arising out of a single fire, have in fact been tried for participation in a conspiracy encompassing a master scheme involving four fires, and this after two previous attempts by the prosecution to have a single jury hear about all these four fires were rejected by the court.

At the outset a single indictment indeed alleged petitioners' participation in all four fires; that indictment was deemed too prejudicial by the court, and was dismissed for that reason. Next, after each of the four fires was made the subject matter of a separate superseding indictment, the prosecution sought to obtain the same atmospheric benefit (with, it goes without saying, the same prejudice to the defendants) by moving to consolidate the four new indictments into a single trial; that motion was denied. But at the present trial of the first superseding indictment, which alleged only a conspiracy arising out of the single

fire at East Flagler Street, the prosecution recurred to its fixation concerning "the master scheme" involving four fires, and was permitted to do so, not only by the trial judge but now with the sanction of the court of appeals.

This is not a case where, under familiar principles (2 Wigmore, *Evidence* [3d ed. 1940] §§ 300, 302, 321, 340-341), evidence of similar acts is admissible in prosecutions involving allegations of fraud to show intent, i.e., to establish that defendants' acts were not done innocently or inadvertently, but were performed with an intent to deceive and defraud. Here the trial judge submitted such evidence of similar acts to the jury for a much broader purpose, committing double error in the process.

First, he erred in charging that the evidence relating to the other fires was limited, not to showing intent to defraud, but to showing intent "to form a scheme to defraud," i.e., to join a conspiracy. But evidence of overt acts not named in an indictment to defraud is admissible to show, not whether a particular defendant joined the conspiracy, but only to show the intent with which he did so. *American Medical Ass'n v. United States,* 130 F. 2d 233, 250-251 (D. C. Cir.), affirmed on other grounds, 317 U. S. 519; *Egan v. United States,* 137 F. 2d 369, 381-382 (C. A. 8); *United States v. Campagna,* 146 F. 2d 524, 530 (C. A. 2), certiorari denied, 324 U. S. 867.

Second, the trial judge erred in never explaining to the jury just which conspiracy the several defendants might be forming, the conspiracy to file claims in respect of the East Flagler Street fire alleged in the indictment, or the master scheme to file claims in respect of four fires that the United States Attorney argued to the jury.

Thus, the charge as given permitted the evidence concerning the other fires to go in for a far broader purpose than that for which it was originally adduced and to which under the authorities it should have been limited, viz., to show intent to defraud. Moreover, by constantly speaking

of "a conspiracy" and "the conspiracy," of "a scheme" and "the scheme," the trial judge submitted to the jury, not the accusation of a limited scheme that was set forth in the indictment and that had been explained in the prosecution's opening argument, but the accusation of the comprehensive master scheme involving a series of four fires that the United States Attorney presented in his final summation.

In consequence, not only was there a plainly prejudicial variance, in the teeth of this Court's ruling in *Kotteakos v. United States,* 328 U. S. 750, but petitioners were accused of one offense and convicted of another, in palpable violation of *Cole v. Arkansas,* 333 U. S. 196, and of *Stirone v. United States,* 361 U. S. 212.

Second. Petitioners are in no sense indulging in afterthoughts when they assert prejudicial error in the trial judge's original charge, "The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted." Not only did they object to that plainly and indeed palpably erroneous formulation, to the extent of seeking a mistrial in consequence, but they were anticipated in their objection by the prosecution: the United States Attorney was the first lawyer on his feet to point out this obvious and fundamental mistake (R. 1441-1442).

But when the judge sought to remedy his lapse, he did not cure the error, he compounded it; his later comment was (R. 1461):

> "I said the Grand Jury, while they only heard only one set of circumstances, from what they heard they decided that if the evidence was not refuted, the defendants ought to be convicted. I withdraw that, because *the rule is, the defendants, if they testify at all, they don't have to rebut anything.* It is for the jury to determine from all the evidence whether they are guilty or innocent."

The italics have been added, because, quite apart from the impression inescapably conveyed by the trial judge's repetition of his original error, an impression plainly not helpful to the defendants, the obvious vice of the attempted correction lies in the interpolated clause, "if they testify at all."

The plain meaning, the only possible meaning of the qualification "if they testify at all," is that, if they do not testify, the statement that "they don't have to rebut anything" becomes inapplicable. The obvious implication of the italicized words is that defendants who do not testify must still rebut what the grand jury has alleged—and here neither the petitioners nor their codefendants took the stand (R. 1299-1300).

In the event, therefore, the trial judge's charge violated at least three fundamental and hitherto unquestioned rules governing the conduct of a criminal trial—one, the rule that the burden of proof is on the prosecution in respect of every element of the offense (*Deutch v. United States,* 367 U. S. 456; *Davis v. United States,* 160 U. S. 469; *Coffin v. United States,* 156 U. S. 432); two, the rule that a defendant is entitled as of right to an instruction that no adverse inference may be drawn from his failure to testify (*Bruno v. United States,* 308 U. S. 287; cf. *Griffin v. California,* No. 202, decided April 28, 1965), so that even minimal comment on his not having testified has been held reversible error (*Stewart v. United States,* 366 U. S. 1); and three, the rule that an indictment is not evidence (e.g., *Poretto v. United States,* 196 F. 2d 392, 392, 395 (C. A. 5)).

And that combination of errors has now been sustained by the court below, "without placing a stamp of approval on the challenged portion of the charge" (*infra,* p. 23), under an application of the charge-as-a-whole doctrine that the same court on two recent occasions had rejected. In *Perez v. United States,* 297 F. 2d 12, 16, the court below said "It is * * * fundamental to our jurisprudence that instructions must be consistent with each other, and not

misleading to the jurors. * * * The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it." This is so, said the court below in *Price v. United States*, 200 F. 2d 652, 655, because "We cannot speculate as to which part would be accepted by the jury * * *."

In the present case, however, those considerations were brushed aside, in order to sustain an instruction that the court below was plainly unwilling to approve.

Third. Petitioners here do not rest their application for review on the circumstance that the rulings of the court below were "wrong." They are asking that certiorari issue to the end that this Court's considered rulings in respect of not trying an accused on one allegation and then convicting him of another be given effect, to the end also that there be no further suggestions in jury charges that a defendant must somehow come forward to deny and rebut what is alleged against him as the price of avoiding conviction and imprisonment.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB KOSSMAN,
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Attorney for the Petitioners.

June 1965.

APPENDIX A.

OPINION BELOW AND JUDGMENT.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 21186

LEON ADJMI, ERWIN COHEN, JOSEPH ADJMI AND CHARLES ADJMI,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(March 31, 1965.)

Before TUTTLE, *Chief Judge,* GROOMS and MCRAE, *District Judges.*

PER CURIAM: Appellants were convicted for violations of the mail fraud statute, Title 18, U. S. C., Section 1341, and for conspiracy to violate said statute, Title 18, U. S. C., Section 371.

Five specifications of error are advanced, including the insufficiency of the evidence as to Charles and Leon Adjmi, and alleged error in the court's oral charge.

A review of the record discloses sufficient evidence to warrant submission of the case as to Leon Adjmi. The record, however, fails to reveal sufficient evidence to warrant submission as to Charles Adjmi.

In the course of the oral charge the court instructed the jury as follows:

"I am charging you and instructing you that the indictment of the case is no evidence whatsoever of the guilt of the accused. It is a mere formal charge. While it will be in your hands for memorandum purposes while you deliberate, you are not to consider it as evidence at all. As I said, the indictment was returned by a Grand Jury, but the Grand Jury heard evidence on only one side of the case. The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at the trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted. So it is upon that theory that the Grand Jury returned an indictment."

In the further course of the charge the court stated:

"[T]he defendants did not take the witness stand. The law protects them on that question. They don't have to take the witness stand and the jury should draw no adverse inferences from the fact that they did not take the stand. That is their right and their counsel has a right so to advise them, and the jury should not be influenced in any way by the fact that they did not testify. The responsibility is upon the Government to prove the averments of the indictment to your satisfaction beyond a reasonable doubt, as I have defined reasonable doubt, and heretofore instructed you."[1]

After counsel for the prosecution directed the court's attention to that part of its charge first quoted, the court withdrew same, saying:

"I think it is proper for me to withdraw that statement. I said the Grand Jury, while they only heard

1. See *Gradsky, et al. v. United States,* decided March 11, 1965, involving like instructions given by the same judge, where this Court stated that if there had been any implication from that part of the charge first quoted that there was an obligation on the defendants to take the witness stand it was completely answered by this further instruction.

only one set of circumstances, from what they heard they decided that if that evidence was not refuted, the defendants ought to be convicted, I withdraw that, because the rule is the defendants, *if they testify at all,* they don't have to rebut anything. It is for the jury to determine from all the evidence whether they are guilty or innocent." (Emphasis supplied)

Appellants contend that the alleged error was compounded in the attempt to withdraw the initial statement. We do not concur in this contention, especially in view of the court's further instruction:

"A reasonable doubt may arise, not only from the evidence produced but also from a lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross examination of witnesses for the prosecution. *The law does not impose upon a defendant the duty of producing any evidence.*" (Emphasis supplied)

Without placing a stamp of approval on the challenged portion of the charge, we conclude that the charge when construed as a whole did not imply that there was any obligation upon the defendants to take the witness stand, did not misplace the burden of proof, and presents no prejudicial error.

We find no error in the other specifications.

The judgments are affirmed as to all defendants, except Charles Adjmi, and are reversed as to Charles Adjmi. The trial court is directed to vacate its judgment of guilty as to Charles Adjmi and to acquit said defendant.

AFFIRMED in part and REVERSED in part, and REMANDED to the District Court for proceedings consistent herewith.

JUDGMENT.

Before TUTTLE, *Chief Judge,* GROOMS and MCRAE, *District Judges.*

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed in part and reversed in part, in accordance with the opinion of this Court; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent therewith.

March 31, 1965

Issued as Mandate: May 21, 1965

APPENDIX B.

ORDER ON PETITION FOR REHEARING.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21,186

LEON ADJMI, ERWIN COHEN, JOSEPH ADJMI AND CHARLES ADJMI,
Appellants

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(May 13th, 1965)

ON PETITION FOR REHEARING

Before TUTTLE, *Chief Judge,* GROOMS and MCRAE, *District Judges.*

PER CURIAM:

It is ORDERED that the petition for rehearing or in the alternative for an order to stay the Court's mandate pending the timely filing and determination of an application for a writ of certiorari filed by Leon Adjmi and Joseph Adjmi in the above styled and numbered cause be, and the same is, hereby DENIED.

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IN THE

Supreme Court of the United States

October Term, 1965.

No. 314

LEON ADJMI and JOSEPH ADJMI,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107
Attorney for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

LEON ADJMI AND JOSEPH ADJMI,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Leon Adjmi and Joseph Adjmi, your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled matter on June 10, 1965.

OPINION BELOW.

The opinion of the court below (Appendix A, *infra*, pp. 9-20) has not yet been reported.

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, p. 21) was entered on June 10, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the trial judge's statement to all of the jurors that he would punish them if they disregarded his instructions not to read newspapers concerning the trial denied petitioner due process of law when prejudicial newspaper articles about the case actually appeared during the trial.

STATUTES INVOLVED.

Petitioners were convicted of conspiracy in violation of 18 U. S. C. § 371 and of mail fraud in violation of 18 U. S. C. § 1341. Since nothing turns on the terms of either provision, they are not set out here.

STATEMENT.

In view of the limited issue presented in this petition, there are set forth below only sufficient facts to place this issue in its proper setting.

A. Indictment. The indictment here in question contained four counts (R. 8-13) [1] alleging the following:

Count One (R. 8-11) charged the appellants (and Charles Adjmi, who was acquitted) with a violation of the mail fraud statute, 18 U. S. C. § 1341. It alleged that the several defendants devised a scheme to defraud twelve named insurance companies by falsely overvaluing the property located at 225 Lincoln Road, Miami, Florida, which was owned by J. & C. A. Corporation (hereinafter called "the corporation"); by falsely overstating the amount of loss suffered in a fire occurring on those premises on March 21, 1958; and by depositing a resultant claim of loss in the mails on May 10, 1958, addressed to General Adjustment Bureau.

Count Two (R. 10) repeated the same allegations in respect of a mailing to Georgia Casualty and Surety Company on June 5, 1958.

Count Three (R. 11) again repeated the same allegations in respect of a mailing to Home Mutual Fire Insurance Company on June 5, 1958.

Count Four (R. 11-13) charged the three individual defendants with conspiracy, in violation of 18 U. S. C. § 371, alleging that they conspired together to devise a scheme to obtain money and property by means of the false pretenses set forth in the substantive counts, and to violate 18 U. S. C. § 1341 by so doing. Only three overt acts were alleged: (1) appellant Leon Adjmi requested one Karpus to prepare a false invoice for merchandise allegedly purchased by the Adjmi brothers [Joseph and Charles];

1. References to figures are to the printed Appendix filed in the court below by petitioner and filed with the Clerk of this Court.

(2) appellant Joseph Adjmi obtained blank invoice forms from Antique Imports Company and caused to be prepared entries thereon alleging that certain merchandise had been purchased from that company when in fact no such merchandise had been purchased; (3) one Cooper, preparing an inventory after the fire was furnished by the defendants invoices said to represent merchandise purchased by appellant Leon Adjmi for the corporation.

B. Prejudicial Publicity. Before the jury was selected, the trial judge, addressing his remarks to all of the prospective jurors in the courtroom (Supp. R. 5),[2] directed the jurors, *inter alia,* "not to read any newspaper accounts pertaining to the trial, or to listen to television or radio broadcasts pertaining to the trial" (Supp. R. 6). He then continued (Supp. R. 6-7):

"Jurors are held to regard the instructions and admonitions given by the Court in connection with the case. The failure of a juror to observe such instructions and admonitions and requests may be subject to punishment by the Court. During my twenty-five years service in the trial courts I have never had to punish a juror for misconduct. There is no reason to anticipate any reason to do so in this case."

Certain prejudicial newspaper articles appeared before the trial had started, and all prospective jurors who had read those articles were eliminated (R. 444-445). During the trial, however, another article appeared in the Tampa Times; this (R. 445-448) referred to the appellants as "the crying Adjmis," said they had been convicted of similar mail fraud and conspiracy charges the preceding fall, which conviction was being appealed, summed up the evidence at the present trial adversely to the defendants, and noted the presence at the present trial of one, Cohen, "who was convicted with the Adjmis in the first mail fraud trial last October."

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2. "Supp. R." refers to the "Second Supplemental Printed Record," a pamphlet consisting of 12 printed pages.

A further newspaper article was shown the trial court (R. 449) which also summed up evidence that was highly damaging to the appellants, who were again referred to as "The crying Adjmis" who were on trial a second time.

Following a colloquy (R. 449-456), the jury was brought back and the trial judge asked (R. 456), "Have any of you since the commencement of this trial read any of the newspaper accounts about the trial?" Three jurors admitted seeing the headlines; one said he did not read the article, another that he quit reading it after a second (R. 456), saying in response to the judge's leading question that he quit reading the moment he saw it related to the trial (R. 457). The judge then said—the judge, not the juror—"And nothing about that would affect you in any way" (R. 457).

C. Verdicts and Sentences. After the prosecution rested (R. 546), motions for judgments of acquittal were made and denied (R. 546-555). Following arguments of counsel and the judge's charge, the case was submitted to the jury at 9 P. M. on Saturday evening, April 25, 1964 (R. 618). At 12:30 A. M. Sunday morning, the jurors were excused until 9:30 the same morning (R. 619-620), and at 11:40 A. M. on Sunday, they returned their verdicts (R. 621-627).

The corporation was convicted on Counts One, Two, and Three, the only ones in which it was named (R. 621-622); petitioner Joseph Adjmi was convicted on all four counts (R. 622-623); Charles Adjmi was acquitted on all four counts (R. 91, 623, 625); and petitioner Leon Adjmi was convicted on all four counts (R. 625-626).

After motions for new trial (R. 93-97, 635-645) were made and denied, Joseph Adjmi and Leon Adjmi were each sentenced to serve an aggregate of ten years (two consecutive and two concurrent sentences) (R. 99-102, 657-658). The corporation was fined $1 on each count, an aggregate of $3. (R. 97-98).

The court below affirmed the judgments of convictions concluding, *inter alia,* that even though the newspapers in Tampa, Florida, printed "news accounts which contained inadmissible facts prejudicial to the appellants" that, "If the appellants' arguments had merit, no case with substantial public interest would survive a motion for a mistrial, for if the court failed to clearly admonish the jurors at the beginning of the trial, they could hardly be blamed for later reading a newspaper about the proceedings. On the other hand, if we must assume that the mild yet direct admonition here given would cause jurors to perjure themselves, then there is no escape from the dilemma. (Appendix A, *infra,* pp. 18-19).

REASONS FOR GRANTING THE WRIT.

The issue presented by this petition involves protections of the individual during the trial as vital and as significant as any actually written into the Constitution.

"Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function." *Estes v. State of Texas,* 33 LW 4543, 4545.

Here the newspaper articles (R. 445-449) (Appendix A, *infra,* p. 14) were admittedly plainly prejudicial. Accordingly, it therefore was the duty of the Court to interrogate the jury to ascertain whether the newspaper articles had created any prejudice in their minds.

But not only was his inquiry inadequate, for it was he and not the juror who stated that the juror was unaffected by the articles (R. 457), but, preeminently, his earlier pronouncement to every prospective juror (Supp. R. 5) that failure to observe his admonitions "not to read newspaper accounts pertaining to the trial * * * may be subject to punishment by the Court" (Supp. R. 6) effectively stifled inquiry.

It is asking too much of human nature to expect a juror to admit doing a forbidden act where such admission bids fair to involve punishment; indeed, it is inviting every juror to incriminate himself. Thus the earlier threat—or promise, it makes no difference here—effectually prevented precisely the kind of meticulous inquiry that, under an unbroken line of authority in every circuit considering the question, is required to be made once it is shown that newspaper articles have appeared during a trial that contain prejudicial matter that would be inadmissible at the trial.

The fact that three jurors held up their hands and told the Court "what" they had seen does not mean that the

ones who did not hold up their hands committed perjury as the court below felt must be assumed. All that one can say with reasonable assurance is "that the threat of punishment" indicated by the trial judge would and did effectively prevent a fair poll of the jurors.

It is submitted that petitioner was deprived of due process of law under the circumstances of this case. It is further submitted that this Court "In the exercise of [its] supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts . . ." should forbid district judges from this kind of "threat of punishment." *Marshall v. United States*, 360 U. S. 310.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

July 1965.

APPENDIX A.

OPINION BELOW.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21584

LEON ADJMI, J. & C. A. CORPORATION AND JOSEPH ADJMI,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(June 10, 1965.)

Before TUTTLE, *Chief Judge,* BELL, *Circuit Judge,* and DYER, *District Judge.*

DYER, District Judge: The appellants were convicted under a four-count Indictment for violations of the mail fraud statute, Title 18, U. S. C., § 1341, and for conspiracy to violate said statute, Title 18, U. S. C., § 371.

Count One alleged that the appellants devised a scheme to defraud twelve named insurance companies by falsely stating the actual cash value of the property on hand in a shop operated by the appellant, J. & C. A. Corporation, on March 21, 1958, was $300,393.49, and, as a result of a fire on that date on the corporation's premises, suffered loss and damage in the amount of $193,989.10; and thereafter, deposited a resultant claim of loss in the mails on May 10, 1958, addressed to the General Adjustment Bureau.

Counts Two and Three repeated the same allegations in respect of a mailing to two different insurance companies on June 5, 1958.

Count Four charged the individual appellants with conspiracy, in violation of 18 U. S. C., § 371, alleging that they conspired together to devise a scheme to obtain money and property by means of the false pretenses set forth in the substantive counts and to violate 18 U. S. C., § 1341 by so doing.

Three specifications of error are urged.

First, it was error to refuse to charge the jury that, if the aggregate of the losses claimed and paid represented the fair value of the damage suffered, the fact that erroneous invoices reflected an inventory figure that was higher than the loss actually claimed was immaterial.

Second, the trial judge's preliminary statement to all of the jurors, that he would punish them if they disregarded his instructions not to read newspapers covering the trial, prevented a fair poll of the jury when prejudicial newspaper articles about the case actually appeared during the trial.

Finally, the court erred in denying the defendants' requests for specific instructions on credibility.

I

The appellant's theory was that if, notwithstanding marked-up invoices, the total sums paid them by the insurance companies were no more than the aggregate of their losses, they had not committed a fraud. The defendants' requested instructions consistent with this theory were refused.

Whether the requested instructions should have been given is dependent upon whether there was any foundation in the evidence or basis in law that would support the theory of defense.

Following the fire, representatives of the insurance companies, together with a public adjuster representing the insured, prepared a verified inventory which was presented as the claim of loss and damage of the insured. The cost value of the merchandise was based upon invoices submitted by appellants except for certain items (1) which were stated to have been purchased for cash and (2) some which appellant, Leon Adjmi, refused to produce because he did not want to reveal the source of purchase that allowed him low prices. Based upon this inventory, the loss resulting from the fire was adjusted.

Of the total loss reflected in the verified inventory, including furniture, the sum of $266,403.72 represented stock, and the asserted loss to stock was $197,041.06. The amount paid resulting from the conferences and settlement negotiations of $193,898.10 was some $44,540.44 less than the asserted total loss of $238,438.54.

One invoice for $16,915.00 showing a sale to the Adjmis prior to the fire was prepared at the request of Leon Adjmi by the alleged seller after the fire. It was not entered on the seller's books; it included items that he did not carry, and the figures on some items amounted to ten times the cost to the J. & C. A. Corporation.

After the fire an accountant was requested to prepare for submission to the insurance companies a list of unpaid

bills of the corporation. Included in these was the sum of $84,400.00 allegedly owed by the corporation to Leon Adjmi for merchandise purchased from him, but the corporate books did not reflect such an obligation, nor did the books of Leon Adjmi reflect this as an obligation due to him. For income tax purposes, this alleged sale was completely disregarded. The items purportedy making up this obligation to Leon Adjmi were included in the documents submitted to the insurance companies and were ultimately shown to be the same linens in regard to which Leon Adjmi refused to reveal the source, because he had purchased them at such a bargain.

The Adjmis obtained from another seller an invoice for the alleged purchase of approximately $25,000.00 worth of merchandise (although the invoice was used merely as an order form) and later wrote the seller that they desired to keep the merchandise that had been shipped on this invoice. This merchandise was neither shipped nor paid for by the appellants, although this invoice was submitted by them to establish the cost of the items therein contained.

Other evidence tended to show costs on items in the invoices submitted to the insurance companies to be many times the actual cost of such merchandise.

Upon this state of the record, the appellants say that if the water in the original total was squeezed out in the course of the settlement process so that the smaller amount submitted to the companies through the mail and paid by them was equal to the actual loss, no one was defrauded.

The evidence does not support this assertion, but, more important, the argument stems from a false premise.

The figures submitted to show cost prices of merchandise (inflated in some instances 4 to 10 times) were not honest mistakes, nor is there any explanation of the fictitious invoices. Appellants, at least for the sake of argument, concede this but simply say no one was defrauded because the companies did not lose any money. This does not follow. To the contrary, the settlement figure was arrived

at through assessing the amount of damage to the goods based upon the inventory submitted by the appellants, not through discounting the values submitted because of false invoices.

Smith v. United States, 230 F. 2d 935, 6 Cir., 1956; *United States v. Park Motors,* 107 F. Supp. 168, D. C. E. D. Tenn., 1952, and *United States v. Beaty Chevrolet Co.,* 116 F. Supp. 810, D. C. E. D. Tenn., 1953, relied upon by appellants are readily distinguishable. The defendants in *Smith* had been told by bank officials that it was proper to include in their application for FHA loans a purpose, other than what was actually so, for which the proceeds of the loans were to be applied. The Court held it was error not to instruct on this factor as negativing fraudulent intent. Nothing in this case remotely resembles this situation.

In *Park Motors* and *Beaty Chevrolet,* car dealers were involved who submitted bills to the government for automobiles sold to veterans. The bills correctly stated the amount due from the government, but falsely stated the price of the automobiles. In *Park Motors,* the dealer acted on the advice of a government official; in *Beaty Chevrolet,* there was an error of judgment by a company employee. These cases simply hold that no fraudulent intent was proved.

Assuming arguendo that the insurance companies did not lose any money, it is of no moment for, as we said in *Kreuter v. United States,* 218 F. 2d 532, 5 Cir., 1955, Section 1341 may be violated regardless of whether the fraudulent scheme is successful. The elements of the offense are simply (1) a scheme to defraud and (2) use of the mails to effect this scheme. *United States v. Shavin,* 287 F. 2d 647, 7 Cir. 1961. The fictitious invoices and inflated cost of items in the inventory were plainly sufficient to show a scheme and intent to defraud and the use of the mails was conceded.

A charge must be adjusted to the fact of a particular case, *Sims v. Texas and New Orleans R. R. Co.,* 267 F. 2d

37, 5 Cir., 1959. There was no factual basis for the charges requested by the appellants and their theory of defense had no basis in law; thus the failure to give them was not error.

II

The appellants were not unknown in Miami, Florida, previous indictments having been returned against them. Thus, upon the motion of the appellants for a change of venue from the United States District Court for the Southern District of Florida, Miami Division, the cause was transferred to Orlando, Florida, to insure a fair and impartial trial. Subsequently, the Middle District of Florida was created and, upon motion of the appellants, the indictment was transferred for trial to the Tampa Division of the Middle District of Florida.

During the course of the trial, the newspapers in Tampa, Florida, printed news accounts which contained inadmissible facts prejudicial to the appellants. They complain that, when this occurred, the Court not only made an inadequate inquiry of the jurors, but, because of the cautionary preliminary instruction to the effect that failure to observe the court's admonitions not to read newspaper accounts pertaining to the trial might subject the jurors to punishment by the court, the inquiry was effectively stifled.

To properly assess this specification of error, it is necessary to consider the breadth of the instructions given by the court so that the language appellants object to in the preliminary cautionary instructions and the asserted inadequacy of the inquiry during the trial may be considered in context.

At the outset, the court, after fully explaining to the jury the function of an Indictment, the presumption of innocence of appellants, and the burden of proof cast upon the government, said:

"* * * in this country we have freedom of the press. That freedom also involves free television and free radio. I am sorry to say that those are rights denied to many people. But it is also fundamental that a defendant in a criminal trial is entitled to a fair trial. A fair trial requires that his guilt or innocence be determined in open court with testimony given under oath.

"It sometimes happens that newspapers, television and radio stations have information about the case which has not been presented in open court and which would not be admissible, if presented. The defendants in this case have the absolute right to have their guilt or innocence determined by you upon evidence presented in open court.

"In order that you may not be influenced in your deliberations by anything not presented in open court you are directed not to read any newspaper accounts pertaining to the trial, or listen to television or radio broadcasts pertaining to the trial or to allow any person to discuss such accounts with you. Jurors are held to regard the instructions and admonitions given by the Court in connection with the case. The failure of a juror to observe such instructions and admonitions and requests may be subject to punishment by the Court. During my twenty-five years service in the trial courts I have never had to punish a juror for misconduct. There is no reason to anticipate any reason to do so in this case."

The Court went on to say that the jurors were not to communicate with the Court, the lawyers, the defendants or witnesses, and then said:

"In the six weeks I have been here there has been practically nothing in the papers about Federal Court procedures. Sometimes we never knew when the newspapers are going to consider something particularly

newsworthy. Heretofore, they have not, but if they should, that is why I am taking this precaution. Sometimes a so-called mail fraud case attracts attention.

"I want first to ask all the jurors here and out there this question: is there any member of this panel who has read some news account about the charges against the defendants here? If you have, will you raise your hands? I won't take your names now but I want to ask you another question before I go further; is there any member of those who held up their hands who has formed an opinion as to what they have read, or what they have heard, as to the guilt or innocence of these defendants? If so, would you indicate by holding up your hands?

"Is there any member of this jury panel who, if selected as one of the jurors in this case, would require evidence to remove from your mind any thought or recollection of what you have read or heard from any newspaper or news account in this matter? In other words, is there any member of this panel who would carry into the jury box any recollection which in your own mind would require you to have evidence before you to remove that recollection?

"Will those who first held up their hands raise their hands? We will bring that up later.

"Is there any member of the panel who feels that they cannot go into this jury box with an open mind, a receptive mind, ready to listen to and be guided solely by the evidence and the instructions of the Court? Is there any member of the panel who feels they cannot go into the trial of this lawsuit and be guided solely by the evidence and the instructions and not as to anything they have heard about the case?

"The record may show that as to the last two questions nobody raised their hands."

"Ladies and gentlemen of the jury: throughout this trial it is the duty of each and every member of the

jury not to converse and communicate among yourselves, or with anyone on any subject about the case in any way. If anyone attempts to talk to you about the case, or in your presence, you must tell that person that you are a juror in the case and you are not at liberty to discuss it. If he or she persists, call them before the Court.

"It is also your duty to keep your minds free and open and not permit any opinions to be formed by you until you have heard all the evidence in the case. You should observe these instructions at all times, whether they are especially called to your attention or not."

When during the course of the trial counsel for the appellants brought to the court's attention the prejudicial newspaper accounts and moved for a mistrial, the court had a duty to inquire whether the articles had created prejudice in the minds of the jurors. *Marson v. United States,* 203 F. 2d 904, 6 Cir., 1953. The jury was returned to the courtroom and the following took place:

"THE COURT: Ladies and gentlemen of the jury, may I have your attention? I want to ask you a question. Have any of you since the commencement of this trial read any of the newspaper accounts about the trial?

"A JUROR: I saw only the headlines and did not read the articles.

"ANOTHER JUROR: I saw that.

"ANOTHER JUROR: I read it a second and then I quit.

"THE COURT: You quit reading the moment you saw it related to the trial."

"THE JUROR: Absolutely.

"THE COURT: And nothing about that would affect you in any way. I think that answers what I wanted to know. I say again, we have a free press and we also

have the right of fair trial and sometimes it is hard to keep the lines clear. But the defendants have a right to have their guilt or innocence passed upon without any newspaper accounts.
"All right, Mr. Levine."

We are of the firm view that, under the circumstances then prevailing, the inquiry made by the court was adequate. Not only had the jurors not read the accounts, but the little the three jurors observed concerning the articles would not have had an effect on them in any way. *United States v. Carlucci,* 288 F. 2d 691, 3 Cir., 1961, cert. den., 366 U. S. 961.

It would serve no useful purpose to attempt to analyze the many cases that have considered this question, for as the court said in *Marshall v. United States,* 360 U. S. 310, "each (case) must turn on its special facts."

Appellants say that it is asking too much of human nature to expect a juror to admit doing a forbidden act where such admission bids fair to invoke punishment; and thus, the earlier admonition had the effect of stifling the inquiry during trial. It must be borne in mind that the court was familiar with the prior publicity given the case—the reason for the transfer from Miami to Orlando, thence Tampa. We think that the trial judge "was extremely sensitive to the problems raised by adverse newspaper publicity," *United States v. Bentvena,* 319 F. 2d 916, 2 Cir., 1963 and was thus aware of the necessity "that trial courts call attention of jurors specifically to the possibility of such newspaper accounts and to admonish jurors not to read them." *Coppedge v. United States,* 272 F. 2d 504, C. A. D. C., 1959.

If the appellants' argument had merit, no case with substantial public interest would survive a motion for a mistrial, for if the court failed to clearly admonish the jurors at the beginning of the trial, they could hardly be blamed for later reading a newspaper about the proceedings. On the other hand, if we must assume that

the mild yet direct admonition here given would cause jurors to perjure themselves, then there is no escape from the dilemma.

What actually took place at this trial refutes the appellants' argument. The inquiry having been made by the court, three jurors, in spite of the "threat of punishment", held up their hands and candidly told the court what they had seen.

We agree that "Appellate Courts should be slow to impute to jurors a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct," *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474.

We find no error in the court's refusal to grant the appellants' motion for a mistrial.

III

One Karpis, a government witness who gave testimony damaging to the appellants, admitted at the trial that he had made prior false and inconsistent statements to postal inspectors. Appellants' requested instructions to the effect that the testimony of Karpis be carefully scrutinized, and if the jury believed that any witness testified falsely concerning a material matter, it had a right to reject all of the testimony of that witness. The court refused, and instead gave the usual general charge on credibility. The appellants specify the court's refusal as reversible error under this Court's ruling in *Coleman v. United States*, 167 F. 2d 837, 5 Cir., 1948.

Coleman, however, does not stand for the proposition that a special instruction on credibility must invariably be given if requested by a defendant. It is only when the evidence tends to show that a witness has exhibited *bias or prejudice against the defendant* that a special instruction should be given "as a matter of protection to the defendants."

As we later pointed out in *Pereira v. United States*, 202 F. 2d 830, 5 Cir., 1953, where the defrauded victim apparently exhibited no venom, ill will or hatred, she was not *per se* a biased or prejudiced witness. We held under such circumstances that a general credibility charge was sufficient, and that a charge on the assumed bias or prejudice of the victim was not required.

Here there was no showing of any ill will on the part of the witness Karpis, and there was no error, therefore, in giving the general and refusing the requested charges.

This case was fully and fairly tried to a jury. The errors specified are without merit. The judgment is AFFIRMED.

APPENDIX B.

JUDGMENT BELOW.

Appeal From the United States District Court for the Middle District of Florida.

Before TUTTLE, *Chief Judge*, BELL, *Circuit Judge*, and DYER, *District Judge*.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 10, 1965.

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 215

LEON ADJMI AND JOSEPH ADJMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 343 F. 2d 164.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1965. A petition for rehearing was denied on May 13, 1965. The petition for a writ of certiorari was filed on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to admit, for the purpose of proving fraudulent intent, evidence of petitioners' similar closely connected acts of mail fraud in con-

nection with false fire insurance claims other than those alleged in the indictment.

2. Whether an erroneous instruction withdrawn by the trial court on petitioners' objection was adequately corrected by the remainder of the charge and by a supplemental instruction.

STATEMENT

Petitioners and three codefendents [1] were convicted by a jury in the United States District Court for the Middle District of Florida on all counts of a three-count indictment charging mail fraud and conspiracy in violation of 18 U.S.C. 1341 and 371 (R. I, 3–5, 49–52). Both petitioners were sentenced to ten years' imprisonment [2] and fined $1,000 (R. I, 66–69). The court of appeals affirmed the convictions *per curiam*. The evidence may be summarized as follows:

1. Prior to May 1958, petitioner Leon Adjmi (the father of Joseph) owned Antique Imports, Inc., whose only assets consisted of a lease [3] on business premises in Miami, Florida, and some furniture (R. I, 511–512, 515). In May 1958, codefendant Cohen purchased this business from Leon Adjmi (R. I, 511–512, 515). Shortly before September 25, 1958, merchandise consisting of linens and china belonging to petitioner

[1] Charles Adjmi, Erwin Cohen and J. & C.A. Corporation were tried at the same time under the same indictment and found guilty as charged. Cohen died after affirmance by the court of appeals. The court of appeals reversed the conviction of Charles Adjmi on the ground of insufficient evidence.

[2] Five-year sentences on counts 1 and 2 run concurrently with each other and the five-year sentence on count 3 runs consecutively to the sentences under counts 1 and 2.

[3] The lease ran to Leon Adjmi, Charles Adjmi and Joseph

Joseph Adjmi was moved into Cohen's shop (R. I, 526–528; R. II, 529–530, 615–616). Insurance in force at the time (much of it placed through an agent introduced to Cohen by Joseph Adjmi (R. I, 365–373)) was $210,000 (R. I, 376–377, 384–385). On September 25, 1958, there occurred in the mezzanine section of Cohen's business a small fire which caused little damage, no heavy smoke and no soot or smoke fallout (R. I, 128, 142–143, 149, 158–163, 182–192, 221–224, 231, 246–249, 263, 302–313, 321, 521; R. II, 547). Some time following the fire, the upstairs and downstairs of the premises were covered with a heavy charcoal deposit which was not soot or smoke fallout and did not result from the fire (R. I, 204–205, 312, 358–359, 400–450). There were no smoke stains (R. I, 358–359, 361). Shortly after the fire, the linens and china were picked up by Leon Adjmi and the "Adjmi boys" and taken to Leon Adjmi's home (R. II, 529–533). When the insurance adjuster came to inspect the damaged merchandise, he was told that the principal damaged items had been "moved out and turned over to Mr. Adjmi, Senior" and that they had been moved out of the city (R. I, 492). They were never made available for inspection (R. I, 494–503). Invoices purporting to show a sale in the amount of $58,000 from the J. & C.A. Corporation[4] to Cohen of the goods "borrowed" by Cohen from Joseph

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Adjmi, copartners doing business under the firm name of Adjmi & Sons (R. I, 518).

[4] The corporation was owned by Joseph and Charles Adjmi (R. II, 625, 649–653, 660, 841). Leon Adjmi had loaned money to the corporation (R. II, 651–652, 664–665).

Adjmi were prepared for fire insurance purposes (R. II, 690–696). Cohen submitted and mailed two proofs of loss aggregating $208,000 (R. I, 453–460, 475–482), which was the total of the merchandise inventory (R. II, 531). The claims were ultimately denied for insufficient proof of loss (R. I, 470, 472, 488–503).

2. At the trial the government also introduced the following evidence for the purpose of establishing fraudulent intent:

a. On January 23, 1958, the J. & C.A. Corporation had a fire in an awning, causing the metal frame to fall so as to break the front door (R. II, 953–955). A claim signed by petitioner Joseph Adjmi was supported by invoices which had been altered to increase the cost of the damaged merchandise by at least $2,000 (R. II, 955–957, 976–977).

b. On March 31, 1958, after petitioner Joseph Adjmi had increased the corporation's insurance policies to $250,000 worth of fire protection, the J. & C.A. Corporation had another fire (R. II, 820–831, 840). There was evidence that an $84,000 fictitious sale-of-goods invoice by petitioner Leon Adjmi to the J. & C.A. Corporation was submitted to the insurance company (R. II, 925–940, 947–951) and that the cost of many items was substantially less than the price listed on the invoices submitted to the insurance company (R. II, 905–913, 966–1023, 1034–1065).

c. Another fire occurred on October 8, 1958, at a ladies apparel and sportswear shop, owned by one Mishon, located just a short distance from the Adjmis' business in Miami (R. III, 1079–1080, 1083, 1111–

1115). Prior to the fire, at petitioner Joseph Adjmi's request, additional insurance—to cover seasonal merchandise to be supplied by Joseph Adjmi—was obtained by Mishon on the understanding that Joseph Adjmi would stand behind the $500 premium check that Mishon was reluctant to write because of lack of funds (R. III, 1148–1156). Proofs of loss on the fire submitted to the insurance company (R. III, 1074–1075) included a bill of sale for $141,000 worth of merchandise not reflected in the books of the J. & C.A. Corporation (R. III, 1086, 1092–1097). Merchandise that was the subject matter of the claims was substantially overvalued (R. III, 1162–1237).

ARGUMENT

1. Petitioners' contention that evidence of similar acts of fraud was erroneously admitted at trial and not adequately limited by the court's instructions to the jury (Pet. 15–17) is without merit. Evidence of petitioners' participation in fraudulent claims relating to fires closely connected in time and circumstance to the fraud charged in the indictment was clearly admissible to show petitioners' fraudulent intent.[5] *Weiss* v. *United States,* 122 F. 2d 675 (C.A. 5), certiorari denied, 314 U.S. 687.

At the close of the trial court's instructions, petitioners objected that the jury had not been adequately

[5] Government counsel argued that this evidence of similar acts was admissible against all defendants, including Cohen, as a part of a single continuous scheme. This theory was rejected by the trial court. *E.g.*, R. III, 1283, 1327. As noted by petitioners (Pet. 9–11), the theory was advanced primarily to support admission of these similar acts by the Adjmis against codefendant Cohen.

warned to limit its consideration of the evidence regarding other fires (R. III, 1450–1451, 1455–1458). As a consequence, the court gave the following additional instructions (R. III, 1468):

> Evidence that an act was done at one time or on one occasion is not any proof whatsoever that a similar act was done at another time or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered in determining whether the accused committed any offense charged in the indictment.
>
> Nor may evidence of alleged earlier acts of a like nature be considered for any other purpose, unless the jury first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular acts charged in the particular count of the indictment then under deliberation.
>
> If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the acts charged in the particular count under consideration, then the jury may consider evidence as to an alleged earlier act of a like nature, in determining the state of mind or intent with which the accused did the acts charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may draw therefrom the inference that in doing the acts charged in the particular count under deliberation, the accused acted willfully and with specific intent and not because of mistake or inadvertence or other innocent reason.

The foregoing instruction was an accurate statement of the applicable law and it properly limited the jury's consideration of the evidence. It was entirely clear from this supplementary instruction that the jury was not to use the evidence pertaining to other fires in deciding whether petitioners had participated in a scheme to defraud; it bore only on the intent with which they acted if other evidence established their participation.[6]

2. Petitioners contend that another instruction to the jury erroneously shifted the burden of proof and reflected on petitioners' failure to take the stand, and that the error was not cured by the court's withdrawal of the instruction (Pet. 17–19). The challenged instruction stated (R. III, 1423):

> The view of the Grand Jury was that if the same evidence which was before the Grand Jury was repeated at trial, unless it is repudiated in some way or overcome in some way, the defendant ought to be convicted.

The trial court also charged the jury as follows:

> The law presumes the innocence and not the guilt of the accused, and each one of them and this presumption attends and protects them throughout the trial until the Government has overcome such presumption by testimony which

[6] Petitioners also suggest that government counsel erroneously argued that the evidence indicated the Adjmis were engaged in a continuous mail fraud scheme encompassing all four fires (Pet. 11–12). This argument was made in summarizing the evidence and was a permissible inference from the evidence. In any event, petitioners failed to object at the time of counsel's argument and cannot complain at this time.

satisfied you of their guilt beyond a reasonable doubt. [R. III, 1426.]

* * * * *

The defendants did not take the witness stand. The law protects them on that question. They don't have to take the witness stand and the jury should draw no adverse inferences from the fact that they did not take the stand. That is their right and their counsel has a right so to advise them, and the jury should not be influenced in any way by the fact that they did not testify. The responsibility is upon the Government to prove the averments of the indictment to your satisfaction beyond a reasonable doubt * * *. [R. III, 1427.]

After the court completed its charge, government counsel directed the court's attention to the instruction now complained of (R. III, 1441–1442), and the court withdrew it, stating (R. III, 1461):

I think it is proper for me to withdraw that statement. I said the Grand Jury, while they only heard only one set of circumstances, from what they heard they decided that if that evidence was not refuted, the defendants ought to be convicted. I withdraw that, because the rule is the defendants, if they testify at all, they don't have to rebut anything. It is for the jury to determine from all the evidence whether they are guilty or innocent.

The court of appeals properly concluded that the charge "when construed as a whole did not imply that there was any obligation upon the defendants to take the witness stand, did not misplace the burden of proof, and presents no prejudicial error." Pet. App.

A, p. 23. The very close reading of the words "if they testify at all" which petitioners now take as the basis for their claim (Pet. 18) is not the meaning which was communicated to the jury by the instruction as a whole. The qualifying clause which petitioners now challenge, when taken in context, only emphasized the fact that petitioners were under no duty to testify.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

Nos. 215 and 314.

LEON ADJMI AND JOSEPH ADJMI,
Petitioners,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MEMORANDUM SUGGESTING THAT A QUESTION OF MOOTNESS EXISTS.

Counsel for the petitioners in the above entitled cases files this memorandum to advise the Court of certain facts which may render the above causes moot.

Petitions for certiorari were filed on behalf of the petitioners on the 4th day of June, 1965 (No. 215), and the 1st day of July, 1965 (No. 314). Both petitioners were sentenced to ten years imprisonment and fined $1,000 in No. 215; and both petitioners were sentenced to ten years imprisonment in No. 314. Petitioners in case No. 215 after having been sentenced filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit and were each enlarged on bonds of twenty-five thousand dollars ($25,000) pending appeal. Petitioners in case No. 314 after

having been sentenced filed a notice of appeal and were each enlarged on bonds of five thousand dollars ($5,000) pending appeal.

On March 31, 1965, the court below affirmed the convictions of these petitioners on No. 215, and on June 10, 1965, the court below affirmed the convictions of these petitioners on No. 314.

On May 13, 1965, the application for rehearing or in the alternative for stay of mandate pending the filing of the petition for writ of certiorari was denied in case No. 215. No application for rehearing or for stay of mandate was made in case No. 314.

Thereafter, upon application of said petitioners in No. 215 for enlargement pending filing a petition for certiorari, Justice Hugo L. Black, on May 27, 1965, entered an order admitting said petitioners to bail pending posting and approval of good and sufficient bail bonds in the amount of twenty-five thousand dollars ($25,000) for each petitioner. Petitioners did not comply with said order and have not complied with this order as of this date.

On July 23, 1965, the petitioners having failed to appear, the United States District Court for the Middle District of Florida, Tampa Division, entered an order declaring a forfeiture of recognizance, a copy of said order is marked Exhibit 1.

Counsel for the petitioners has been unable to communicate with petitioners and has not heard from them since on or about May 24, 1965. Counsel for the petitioners communicated with members of the petitioners' family (brother and sister), but received no information as to petitioners whereabouts. Counsel for petitioners communicated with the surety of the bonds for the petitioners who has been searching for them but was informed that he has been unable to communicate with the petitioners or indeed to apprehend them.

In *Eisler v. United States,* 338 U. S. 189, where the petitioner admittedly fled from the country after the grant

of his petition for writ of certiorari, and after the submission of his cause on the merits, this Court in a Per Curiam decision ordered ". . . that the cause will be left off the docket until a direction to the contrary shall issue."

Counsel for the petitioners submits to this Court's attention the dissenting opinion of Justice Murphy in the above case at page 194 wherein it is stated ". . . that it is the importance of the legal issues, not the parties, which bring the case to this Court."

Respectfully submitted,

JACOB KOSSMAN,
Counsel for Petitioners.

July, 1965.

EXHIBIT 1.

EFB:vs/7-23-65

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA *v.* JOSEPH ADJMI and LEON ADJMI	Case No. 63-115-T. Cr.

FORFEITURE OF RECOGNIZANCE.

WHEREAS, this cause was called on July 23, 1965, after due notice, for commencement of sentence of each of the defendants herein pursuant to judgment and commitment of this Court entered on December 23, 1963, in this cause, and the defendants, Joseph Adjmi and Leon Adjmi, failed to appear; thereupon the defendants were called three times but failed to answer and defaulted in their appearance; thereupon the Maryland National Insurance Company, surety upon the recognizances executed for the appearance of the said defendants before this Court, was called and ordered to bring the bodies of its principals, the said Joseph Adjmi and Leon Adjmi, but it failed and defaulted therein. It is, therefore,

ORDERED that the default of the said Joseph Adjmi and Leon Adjmi, principals, and the said Maryland National Insurance Company, surety, be and the same is hereby entered of record in this cause.

DONE AND ORDERED at Tampa, Florida, this 23rd day of July, 1965.

s/ JOSEPH P. LIEB
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 314

LEON ADJMI and JOSEPH ADJMI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1965. The petition for a writ of certiorari was filed on July 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court's preliminary statement to all the jurors admonishing them not to expose themselves to news reports about the trial and warning that jurors who disregard the court's instructions may be subject to punishment prevented a fair poll of the jury when newspaper articles about the case actually appeared during the trial.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Middle District of Florida on all counts of a four count indictment charging mail fraud and conspiracy in violation of 18 U.S.C. 1341 and 371 (R. I, 8-13, 79-82, 87-90; R. II, 622-626).[1] Both petitioners were sentenced to imprisonment for a period of ten years (R. I, 99-102).[2]

1. The evidence at trial may be summarized as follows:

On March 21, 1958, a fire occurred on the premises of the J. & C.A. Corporation[3] in Miami, Florida

---

[1] Co-defendant Charles Adjmi was acquitted on all four counts (R. I, 83-86, 91). The J. & C.A. Corporation, also a co-defendant, was convicted on the three substantive counts (R. I, 76-78).

[2] Five year concurrent sentences on counts one and two to run consecutively with five year concurrent sentences on counts three and four.

[3] The corporation was owned by Joseph and Charles Adjmi (R. I, 136, 188). Leon Adjmi had loaned money to the corporation and was active in its affairs.

(R. I, 147-148, 159, 187). Shortly before the fire, petitioner Joseph Adjmi had increased the corporation's insurance policies to $250,000 worth of fire protection (R. I, 145-147). An inventory of merchandise was made and invoices were submitted by petitioner Joseph Adjmi to verify the cost of goods purportedly damaged or destroyed in the fire (R. I, 159-166, 168, 195, 259-264).[4] The claims to the insurance companies included an $84,000 fictitious sale-of-goods invoice by petitioner Leon Adjmi to the J. & C.A. Corporation, a transfer which was not reflected in the corporate books or in the records of Leon Adjmi and was completely disregarded by Leon Adjmi for income tax purposes (R. II, 352-357, 359-360, 371). Other proofs of loss submitted to the insurance companies included a fictitious invoice prepared after the fire at petitioner Leon Adjmi's request which showed a sale of goods for $16,915 before the fire (R. I, 198, 285, 316-319). Another seller gave the Adjmis an invoice reflecting a sale of about $25,000 worth of merchandise which, in fact, was neither shipped nor paid for, although the invoice was submitted to the insurance companies to establish the cost of the goods contained therein (R. II, 472-491). Many other items listed in invoices used to verify costs were overvalued by many times their

---

[4] The total value of merchandise and fixtures on the premises was fixed at $313,598.79 (R. I, 177). The total fire loss claimed was $238,438.54 (R. I, 206). The merchandise, represented as costing $266,403.72, allegedly sustained damage amounting to $197,041.06 (R. I, 168). Claims were eventually settled by the insurance companies for about $194,000 (R. I, 167-168, 172).

actual cost (R. I, 319-326; R. II, 392-395, 402-414). Proofs of loss were transmitted to the insurance companies through the mails (R. I, 200-203, 217-219).

2. Before the jury was selected, the court instructed all of the prospective jurors generally on the function of the indictment, the presumption of innocence, the burden of proof and the necessity of considering only evidence presented at trial (Supp. R. 5-10). During the course of this discussion, the court stated that (Supp. R. 6-7):

> It sometimes happens that newspapers, television and radio stations have information about the case which has not been presented in open court and which would not be admissible, if presented. The defendants in this case have the absolute right to have their guilt or innocence determined by you upon evidence presented in open court.
>
> In order that you may not be influenced in your deliberations by anything not presented in open court you are directed not to read any newspaper accounts pertaining to the trial, or listen to television or radio broadcasts pertaining to the trial or to allow any person to discuss such accounts with you. Jurors are held to regard the instructions and admonitions given by the Court in connection with the case. The failure of a juror to observe such instructions and admonitions and requests may be subject to punishment by the Court. During my twenty-five years service in the trial courts I have never had to punish a juror for misconduct. There is no reason to anticipate any reason to do so in this case.

Later the court inquired of the jury (Supp. R. 10):

> Is there any member of the panel who feels that they cannot go into this jury box with an open mind, a receptive mind, ready to listen to and be guided solely by the evidence and the instructions of the Court? Is there any member of the panel who feels they cannot go into the trial of this lawsuit and be guided solely by the evidence and the instructions and not as to anything they have heard about the case?
>
> The record may show that as to the last two questions nobody raised their hands.

During the trial, counsel brought to the court's attention certain newspaper articles published in local papers [5] and the court made the following examination of the jury (R. II, 456-457):

> THE COURT: Ladies and gentlemen of the jury, may I have your attention? I want to ask you a question. Have any of you since the commencement of this trial read any of the newspaper accounts about the trial?
>
> A JUROR: I saw only the headlines and did not read the articles.
>
> ANOTHER JUROR: I saw that.

---

[5] One article appeared on page 6-A of The Tampa Times under the headline "Mail Fraud, Conspiracy Charges, Crying Adjmis Defense Near" (R. II, 444-448). The other article appeared on page 8-A of two successive editions of The Tampa Tribune under the headline "Fake Papers Cited in Adjmi Case" (R. II, 449). Petitioners' main objection was that both articles stated that all three Adjmis had recently been convicted on similar charges. The prior conviction noted was affirmed by the court of appeals, 343 F. 2d 164, and is presently pending before this Court. No. 215, O.T. 1965.

ANOTHER JUROR: I read it a second and then I quit.

THE COURT: You quit reading the moment you saw it related to the trial.

THE JUROR: Absolutely.

THE COURT: And nothing about that would affect you in any way. I think that answers what I wanted to know. I say again, we have a free press and we also have the right of fair trial and sometimes it is hard to keep the lines clear. But the defendants have a right to have their guilt or innocence passed upon without any newspaper accounts.

Defense counsel did not object that the inquiry had been inadequate. In the final instructions to the jury prior to deliberation, the court again admonished the jury as follows (R. II, 614-615):

(d) In connection with these instructions and in connection with all phases of the case you will consider such matters only as are shown by the evidence presented in open court; and you should consider such issues as are submitted to you by these instructions and no others.

(e) If any juror should happen to know any fact or facts bearing upon this case, either directly or indirectly, which fact or facts were not produced from the evidence admitted in the case, or by reasonable deduction therefrom, he or she should not communicate such to his or her fellow jurors not let the same have any weight in his or her consideration of the case. The law requires that you discuss and rely alone for your verdicts herein upon the evidence produced in this case.

ARGUMENT

There is no merit in petitioners' contention that the trial court "threat[ened to] punish" jurors who disregarded the court's instruction not to expose themselves to news reports of the trial and that this "threat" prevented a fair polling of the jury about newspaper articles appearing in local publications during the trial (Pet. 7-8). As set forth in the Statement, the record shows that the trial court was well aware of the problem of publicity concerning this case from the beginning to the end of the trial. Consistent with established practice, the court adopted the preventive measure of admonishing the jury not to read newspaper accounts of the trial and warned of the court's power to punish those who disregard the instructions of the court. When newspaper articles about the trial were called to the court's attention, the jurors were asked about them. This examination demonstrated that the court's previous admonition had accomplished its deterrent purpose in that, of the three jurors who saw the newspaper accounts, two of them read no further than the headlines and the third read only for "a second" until he became aware that the material related to the trial. The arrangement and content of the newspaper articles and the jurors' answers to questioning by the court were sufficient basis to conclude that these jurors did not read anything prejudicial.[6] Defense counsel apparently felt

[6] Petitioners' assume that the news accounts were prejudicial (Pet. 7), as did the court of appeals (Pet. App. A, p. 14). We submit that, while the jury should not be exposed

the inquiry was adequate at the time, for they failed to object to it. Under the circumstances, there was no reason to grant the motion for a mistrial. See *United States* v. *Carlucci*, 288 F. 2d 691 (C.A. 3), certiorari denied, 366 U.S. 961.

Petitioners' further assertion that any inquiry would have been inadequate as a matter of law since, human nature being what it is, the so-called "threat of punishment" instruction would cause jurors to remain silent in the face of the court's inquiry is speculative in theory and without foundation in fact. Indeed, in this instance three jurors candidly told the court what they had seen. There is no reason to suspect that the rest of the jury disregarded its duty to respond to the court's inquiry.[7] *Irvin* v. *Dowd*, 366 U.S. 717, 722-723. *Rizzo* v. *United States*, 304 F. 2d 810, 814-816 (C.A. 8), certiorari denied *sub nom. Nafie* v. *United States*, 371 U.S. 890 and cases cited.

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to any out-of-trial information on the case, these two articles could hardly be considered of the kind which would justify a mistrial where the court has repeatedly instructed the jury that the case is to be decided solely upon the evidence presented at trial—except, perhaps, where a juror affirmatively declares that his judgment has been influenced.

[7] The results of the trial support the conclusion that the jury followed its strict instructions to decide the issues solely upon the evidence at trial. The evidence as to Charles Adjmi was weak. The evidence as to petitioners' guilt was uncontested and overwhelming. Notwithstanding the fact that the two news accounts of the trial failed to distinguish between the three defendants and stated that all three Adjmis had been previously convicted on similar charges, the jury acquitted Charles Adjmi.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.[8]

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[8] Since this brief in opposition was prepared, petitioners have filed a "Memorandum Suggesting That A Question of Mootness Exists" in Nos. 215 and 314, this Term. The facts referred to in that memorandum—that petitioners have violated the condition of their bonds and disappeared—do in fact seem to make this Court's decision in *Eisler* v. *United States*, 338 U.S. 189, applicable to both No. 215 and No. 314. Accordingly, the petitions may be dropped from the docket until petitioners reappear. We are submitting this brief in opposition for use when and if the petitions are restored to the docket.

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